

Testimony of Greg Darnell.

The RLECs were represented at the hearing by M. John Bowen, Jr., and Margaret M. Fox. The RLECs presented the Direct Testimony of Douglas Duncan Meredith and Valerie Wimer, as well as the Surrebuttal Testimony of Douglas Duncan Meredith.

The Office of Regulatory Staff (“ORS”) was represented at the hearing by Shannon B. Hudson and Benjamin P. Mustian. ORS did not present a witness.

In their pleadings, the Parties identified twenty-one (21) unresolved issues that required the Commission’s attention. Negotiations between MCI and the RLECs continued after the filing of the Petition. During the course of those continued negotiations, the Parties were able to resolve the following issues: 1, 2, 4, 5, 7, 9, 11, 12, 18, 19 and 20. The Parties agreed to group the ten remaining issues into four conceptual topics for discussion purposes as follows: (1) Direct vs. Indirect Service (Issues 6, 10(a), 15, and 17); (2) ISP-Bound Traffic and Virtual NXX (Issues 8, 10(b), and 13); (3) Reciprocal Compensation Rate (Issue 21); and (4) Calling Party Identification (Calling Party Number (“CPN”) and Jurisdictional Indicator Parameter (“JIP”)) (Issues 3, 14, and 16).

## **II. LEGAL STANDARDS AND PROCESSES FOR ARBITRATION**

After a telecommunications carrier has made a request for interconnection with another telecommunications carrier, and negotiations have continued for a specified period, the Act allows either party to petition a state commission for arbitration of unresolved issues. 47 U.S.C. § 252(b)(1). The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved, and must

include all relevant documentation, including the position of each of the parties with respect to the unresolved issues. 47 U.S.C. §§ 252(b)(2)(A). A non-petitioning party to a negotiation under this section may respond to the other party's petition and may provide such additional information as it wishes within twenty-five (25) days after the state commission receives the petition. 47 U.S.C. § 252(b)(3). The Act limits a state commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and the response. 47 U.S.C. § 252(b)(4).

Through the arbitration process, the Commission must now resolve the remaining disputed issues in a manner that ensures the requirements of Sections 251 and 252 of the Act are met. Once the Commission provides guidance on the unresolved issues, the parties will incorporate those resolutions into a final agreement that will then be submitted to the Commission for its final approval. 47 U.S.C. § 252(e).

The purpose of this arbitration proceeding is the resolution by the Commission of the remaining disputed issues set forth in the Petition and Response. 47 U.S.C. § 252(b)(4)(c). Under the Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission ("FCC") regulations pursuant to Section 252; and shall provide a schedule for implementation of the terms and conditions by the parties to the Agreement. 47 U.S.C. § 252(c).

### **III. DISCUSSION OF ISSUES**

As noted above, ten issues remain for the Commission to resolve, and those issues can be grouped as follows: (1) Direct vs. Indirect Service (Issues 6, 10(a), 15, and 17);

(2) ISP-Bound Traffic and Virtual NXX (Issues 8, 10(b), and 13); (3) Reciprocal Compensation Rate (Issue 21); and (4) Calling Party Identification (CPN and JIP) (Issues 3, 14, and 16).

In this section, we will address and resolve the open issues that have not been settled by negotiation and, therefore, must be resolved by the Commission pursuant to Section 252(b)(4) of the Act. The issues which the Commission must resolve are set forth in this section, along with a discussion of each issue that sets forth the Commission's findings and conclusions.

**TOPIC 1: DIRECT vs. INDIRECT SERVICE (Issues 6, 10(a), 15, and 17)**

We will discuss Issues 6, 10(a) and 15 together, because the argument is the same, and will address the separate but related Issue 17 separately.

**ISSUE 6: Should End User Customer be defined as only the End User directly served by the Parties to the contract?**

**MCI's Position:**

No. End User Customers may be directly or indirectly served. The Act expressly permits either direct or indirect service.

**RLECs' Position:**

Yes. This agreement is limited in scope to the intraLATA traffic exchanged between customers directly served by one party and the customers directly served by the other party. Other carriers that provide local exchange services to customers and wish to exchange traffic with the RLECs must establish their own interconnection or traffic exchange agreements with the RLECs.

**ISSUE 10(a): Should MCI have to provide service only directly to end users?**

**MCI's Position:**

No. End User Customers may also be indirectly served by the Parties through resale arrangements. The Act requires both Parties to the contract to allow resale. The same "directly or indirectly" language is used in section 2.22 of ITCs' model contract for defining interexchange customers. The ILECs thus do not attempt to limit the resale ability of IXC's, and there is no reason why they should try to do so regarding local exchange.

**RLECs' Position:**

For purposes of this agreement, yes. The traffic governed by this agreement is for telecommunications service provided by either Party to end user customers and not for service provided by MCI to a third party as a private carrier.

**ISSUE 15: Does this contract need this limit of "directly provided" when other provisions discuss transit traffic, and the issue of providing service directly to end users is also debated elsewhere?**

**MCI's Position:**

No. This language is unnecessary and confusing in light of other provisions of the contract.

**RLECs' Position:**

Yes. As discussed in Issues 6 and 10(a), third party traffic is not part of this agreement between the RLECs and MCI.

Discussion:

The issue here is whether an RLEC may appropriately limit the scope of its Agreement with MCI so that it applies only between the RLEC and MCI – and relates to the exchange of their respective end user customers' traffic. We believe it is appropriate to limit the Agreement so that it applies only to the RLEC and MCI and to the traffic generated by the Parties' direct end user customers on their respective networks.

The RLECs are required to provide interconnection and to exchange traffic only with other telecommunications carriers.<sup>2</sup> This Agreement is properly limited in scope to the intraLATA traffic exchanged between customers directly served by one party and the customers directly served by the other party, and the definition of "end user" is properly limited to retail business or residential end-user subscribers (*i.e.*, it does not include other carriers).

The carrier directly serving the end user customer is the only carrier entitled to request interconnection for the exchange of traffic under Section 251(b) of the Act. Other carriers that provide local exchange service and wish to exchange traffic with the RLECs must establish their own interconnection or traffic exchange agreements with the RLECs. While it may be appropriate under certain circumstances for a telecommunications carrier to interconnect its facilities indirectly with an RLEC's network under Section 251(a) of the Act, this provision does not allow *non-telecommunications* service providers to interconnect (either directly or indirectly), nor does it relieve an interconnecting carrier of the obligation to establish its own

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<sup>2</sup> See Section 251 of the Federal Telecommunications Act of 1996 (the "Act").

arrangements for exchanging traffic and establishing an appropriate compensation agreement with the telecommunications carrier to which it is indirectly connected.

MCI's argument that Section 251(a) of the Act requires the RLECs to transport and terminate third-party traffic is erroneous. 47 U.S.C. § 251(a) requires that:

Each telecommunications carrier has the duty---

- (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.

The duty to interconnect under Section 251(a) of the Act relates to "the physical linking of two networks for the mutual exchange of traffic."<sup>3</sup> It does *not* require a carrier to transport and terminate another carrier's traffic.<sup>4</sup> Transport and termination obligations extend from Section 251(b) of the Act and apply only directly between local exchange carriers.<sup>5</sup> Nothing in the Act supports MCI's contention that indirect *service to end user customers* was contemplated, much less permitted, by the Act. In fact, the FCC's rules implementing interconnection uniformly address interconnection as a bilateral agreement between two carriers, each serving end user customers within the same local calling area. Section 251(b) describes duties for each "local exchange carrier" with respect to other

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<sup>3</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8<sup>th</sup> Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *aff'd in part and remanded, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997) ("*Local Competition Order*") at ¶ 11.

<sup>4</sup> See *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corporation*, File No. E-97-003, FCC 01-84, Memorandum Opinion and Order (rel. Mar. 13, 2001), at ¶ 23 ("In the *Local Competition Order*, we specifically drew a distinction between 'interconnection' and 'transport and termination,' and concluded that the term 'interconnection,' as used in section 251(c)(2), does not include the duty to transport and terminate traffic.").

<sup>5</sup> See Section 251(b)(5); *Local Competition Order*, CC Docket 96-98, FCC 96-325 at ¶ 1034.

“local exchange carriers.” The FCC’s *Local Competition Order* discusses the exchange of traffic for local interconnection purposes in which two carriers collaborate “to complete a local call.”<sup>6</sup>

Interconnection under Section 251(a) is available only to telecommunications carriers.<sup>7</sup> Likewise, the obligations imposed by Section 251(b), including the duty to transport and terminate traffic, relate to parallel obligations between two competing telecommunications carriers serving within a common local calling area. Whether Voice over Internet Protocol (“VoIP”) will be classified as a telecommunications service or information service is currently an open question before the FCC.<sup>8</sup> Unless and until the FCC does classify VoIP as a telecommunications service, VoIP providers do not have rights or obligations under Section 251. Thus, where MCI intends to act as an intermediary for a facilities-based VoIP service provider, the VoIP provider would most likely argue that it is currently not required (and may never be required) to provide dialing parity or local number portability and, therefore, the duties of the RLECs and the VoIP service provider would not be parallel. This type of a non-parallel relationship was not contemplated or provided for under the Act.

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<sup>6</sup> See *Local Competition Order*, CC Docket 96-98, FCC 96-325 at ¶ 1034.

<sup>7</sup> See Section 251(a)(1) of the Act (“Each telecommunications carrier has the duty . . . to interconnect . . . with the facilities and equipment of other telecommunications carriers . . .”) (emphasis added).

<sup>8</sup> See Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4863 (2004); *Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267, Memorandum Opinion and Order (rel. Nov. 12, 2004), (“*Vonage Order*”), fn 46 (“We do not determine the stature classification of Digital Voice under the Communications Act, and thus do not decide here the appropriate federal regulations, if any, that will govern this service in the future.”).

Furthermore, the FCC's regulation on reciprocal compensation specifically refers to the *direct relationship of the carrier to the end user customers in the exchange of traffic.*

For purposes of this subpart, a reciprocal compensation arrangement *between two carriers* is one in which *each of the two carriers* receives compensation *from the other carrier* for the transport and termination *on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.*<sup>9</sup>

The RLECs' position that only traffic directly generated by RLEC and MCI end user customers should be exchanged pursuant to the Agreement is in keeping with the language and intent of the Act, as well as FCC rules and orders.

An interconnection agreement is between two parties who are offering local exchange service in the same area. Neither third parties nor their traffic are part of an interconnection agreement between the RLECs and MCI. MCI attempted to point out that the proposed Agreement provides for transit traffic, which, according to MCI, is third party traffic. However, the issue of performing a transit function is separate and distinct from the issue of indirect traffic exchange of third parties' end-user customers. The only reason this agreement has language regarding transit traffic is because RLECs have tandem switches in their networks. When MCI originates local traffic that terminates to a CLEC or another carrier that has an NPA-NXX with a homing arrangement to the RLEC tandem in the LERG, a transit function is required. If MCI originates such traffic, the agreement states that MCI will pay the transit rate to the RLEC. The transit language

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<sup>9</sup> 47 CFR § 51.701(e) (emphasis added).



does not place any obligations on third-party carriers. In addition, the language specifically states that payment of reciprocal compensation on such traffic is not part of this agreement but instead must be negotiated between MCI and the third party. Providing for transit in the Agreement is consistent with the RLEC position that the carriers may have indirect “physical” interconnection facilities but must also have direct contractual arrangements for the transport and termination of traffic.

Applicable statutory and case law support the RLECs’ position that MCI is not entitled to interconnection to act as an intermediary for a third party that will, in turn, provide services to end users. “Telecommunications carrier” is defined in the federal Act as a provider of telecommunications service.<sup>10</sup> “Telecommunications service” means “the offering of telecommunications for a fee *directly to the public*, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”<sup>11</sup> Applying these definitions to the situation here, to the extent MCI seeks to provide service to Time Warner Cable Information Services, LLC (“TWCIS”), or indirectly to TWCIS’ end user customers, such service does not meet the definition of “telecommunications service” under the Act and, therefore, MCI is not a “telecommunications carrier” with respect to those services. Thus, MCI is not entitled to seek interconnection with the RLECs with respect to the service MCI proposed to provide indirectly to TWCIS’ end user customers.

This reasoning is consistent with the United States Court of Appeals for the District of Columbia Circuit’s interpretation of the Act. The Court has held that, when a

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<sup>10</sup> Section 153(44) of the Act.

<sup>11</sup> Section 153(46) of the Act.

carrier is not offering service “directly to the public, or to such classes of users to be effectively available directly to the public,” that carrier is not a telecommunications carrier providing telecommunications service under the Act with respect to that service.<sup>12</sup> Under this precedent, the RLECs have properly required that the Interconnection Agreement between the RLECs and MCI be limited to the exchange of traffic generated by the end user customers directly served by the parties.

Other states have addressed the same issue that is presently before the Commission. The Iowa Utilities Board (“Iowa Board”) recently dismissed a request by Sprint Communications Company, L.P. (“Sprint”) to interconnect with twenty-seven rural carriers for the purpose of providing interconnection and services to a cable company that would, in turn, serve the end user customers.<sup>13</sup> The Iowa Board found that Sprint’s service was not being offered on a common carrier basis but to “its private business partners pursuant to individually negotiated contracts,” and that Sprint, therefore, was not a telecommunications carrier under the Act, pursuant to the precedent of the *Virgin Islands* decision.

MCI points to an Ohio Public Utilities Commission decision to support its argument.<sup>14</sup> However, as the Iowa Board specifically noted, the Ohio Commission failed to even mention the D.C. Circuit Court’s *Virgin Islands* decision and the related FCC

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<sup>12</sup> *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

<sup>13</sup> *In re Arbitration of Sprint Communications Co. v. Ace Communications Group, et al.*, Iowa Util. Bd., Docket No. ARB-05-2, Order Granting Motions to Dismiss (rel. May 26, 2005), 2005 WL 1415230 (slip opinion) (“*Iowa Board Order*”).

<sup>14</sup> See *In re the Application and Petition in Accordance with Section II.A.2.b of the Local Service Guidelines* filed by The Champaign Telephone Company, et al., Case No. 04-1494-TP-UNC, Finding and Order (issued January 26, 2005), Order on Rehearing (issued April 13, 2005).

rulings.<sup>15</sup> The Iowa Board found the Ohio Commission's decision to be "of little help in this proceeding."<sup>16</sup>

Other state decisions addressing similar issues are not controlling.<sup>17</sup> It is important to note that, unlike rural local exchange carriers in some other states, the RLECs are not arguing that they should not be required to interconnect with MCI *at all*; they merely seek to limit the Interconnection Agreement so that it applies to interconnection and the exchange of traffic between end user customers served directly by the parties, as intended by the Act. The RLECs want to have a direct relationship with each telecommunications carrier that actually provides service to the end user customer.

MCI claims that the RLECs' proposal would prevent MCI from reselling its service. The RLECs assert this is not true, and that MCI's proposed arrangement with TWCIS does not constitute resale. In a resale situation, MCI would be the underlying facilities-based provider and the reseller would simply provide the complete service to the customer under a different name. MCI would still control the traffic, and would provide the switch and the loop to the customer premises. This is permitted under the Agreement. What MCI seeks to do with TWCIS, on the other hand, is different because TWCIS itself is the facilities-based carrier<sup>18</sup> and MCI would have no control over the

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<sup>15</sup> *Iowa Board Order* at 15.

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., *Order, Cambridge Telephone Company, et. al., in Petitions for Declaratory Relief and/or Suspensions for Modification Relating to Certain Duties Under §§ 251(b) and (c) of the Federal Telecommunications Act*, No. 05-0259-0265, -0270, -0275, -0277, and -0298, Illinois Commerce Commission (July 13, 2005) (*Illinois Commerce Commission order*) (petition for reconsideration pending); *Order Resolving Arbitration Issues, Petition of Spring Communications, L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Inter-carrier Agreement with Independent Companies*, Case 05-C-0170, State of New York Public Service Commission (May 24, 2005).

<sup>18</sup> See, e.g., TWCIS S.C. Tariff No. 1, on file with the Commission, at p. 9 ("The Company's IP Voice

service or the end user.

For the reasons stated above, we find that the agreement between the RLECs and MCI is properly limited to include traffic of end user customers directly served by the respective parties. We, therefore, adopt the following language proposed by the RLECs:

General Terms and Conditions; Glossary; § 2.17 -- Definition of "End User":

A retail business or residential end-user subscriber to Telephone Exchange Service provided directly by either of the Parties.

Interconnection Attachment, § 1.1:

This Interconnection Attachment sets forth specific terms and conditions for network interconnection arrangements between ILEC and CLEC for the purpose of the exchange of IntraLATA Traffic that is originated by an End User Customer of one Party and is terminated to an End User Customer of the other Party, where each Party directly provides Telephone Exchange Service to its End User Customers physically located in the LATA. This Agreement also addresses Transit Traffic as described in Section 2.2 below. This Attachment describes the physical architecture for the interconnection of the Parties' facilities and equipment for the transmission and routing of Telephone Exchange Service traffic between the respective End User Customers of the Parties pursuant to the Act.

Interconnection Attachment, § 3.1:

Dedicated facilities between the Parties' networks shall be provisioned as two-way interconnection trunks, and shall only carry IntraLATA traffic originated or terminated directly between each Parties' End User Customers. The direct interconnection trunks shall meet the Telcordia BOC Notes on LEC Networks Practice No. SR-TSV-002275.

**ISSUE 17: Should the Parties be providing service directly to End Users to port numbers?**

**MCI's Position:**

No. This is not required for any industry definition of LNP. MCI is certified to

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Service is offered solely to residential customers who are subscribers to Time Warner Cable's cable modem and/or cable television service.")

do LNP for the End Users that indirectly or directly are on its network. Concerns that *some resellers may not be telecommunications carriers or must provide the same type telecommunications services provided prior to the port is an illegal limit on what entities MCI can provide wholesale telecommunications services.* The FCC has even allowed IP-Enabled (VoIP) service providers to obtain numbers directly without state certification. See the FCC's CC Docket 99-200 order released February 1, 2005, granting SBC Internet Services, Inc. a waiver of section 52.15(g)(2)(i) of the FCC's rules. And MCI knows no law requiring that the same type of Telecommunications Service provided prior to the port has to be provided. That is antithetical to the goals of competition.

RLECs' Position:

Yes. The current FCC rules require only service provider portability. The RLEC language proposed in the agreement is consistent with the RLEC obligations and the FCC's rules regarding number portability.

Discussion:

This issue deals with Local Number Portability ("LNP") and whether MCI is permitted to obtain LNP when it does not intend to directly serve the end user customers to whom the numbers will be ported. Current Federal Communications Commission ("FCC") rules on LNP require only service provider portability.

The definition of service provider portability states:

[S]ervice provider portability means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to

another.<sup>19</sup>

Service provider portability is the only type of portability required.<sup>20</sup> At some point in the future consideration may be given to other types of portability, but there are no rules or standards today providing for or governing porting of numbers to non-telecommunications carriers.

The definition of service provider portability is clear that the port must be between *two telecommunications carriers*.<sup>21</sup> This would also require end users to have *telecommunications service* before and after the port.<sup>22</sup> The definition does not provide for porting to a customer who switches to a non-telecommunications service. It also does not provide for porting between a telecommunications service provider and a non-telecommunications service provider. There are no rules requiring these types of ports. There are also no standards in the Alliance for Telecommunications Industry Solutions (“ATIS”) standards body to address how these ports would actually take place, the billing associated with the resulting calls, and how traffic would be exchanged.

MCI appears to expect that the arrangement it reaches with the RLECs will enable MCI to port numbers from the RLECs so that MCI can, in turn, provide those numbers to TWCIS for use by TWCIS’ VoIP end user customers.<sup>23</sup> In this indirect relationship, there is no assurance that the end-user customer that requested the port will actually retain the

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<sup>19</sup> 47 C.F.R. § 52.21(q).

<sup>20</sup> See Third Report and Order, *Telephone Number Portability*, 13 F.C.C.R. 11701 (1998), at ¶ 3 (“In light of the statutory definition, Section 251(b)(2) requires service portability, but not location or service portability.”).

<sup>21</sup> See 47 C.F.R. § 52.21(q).

<sup>22</sup> *Id.*

<sup>23</sup> See TR at 127, ll. 10-12 (“MCI’s local switch will be handling the traffic from Time Warner Cable’s customers, using its numbers or porting numbers to end users in the RLECs’ territories.”).

number, since MCI has no relationship with the end-user customer. This does not meet *the definition of service provider portability and the RLECs are under no obligation to allow this type of porting.* Therefore, the RLECs have proposed language that would allow MCI to properly port RLEC numbers to MCI's end user telecommunications service customers, but would not allow for other types of porting that the RLECs are not obligated to provide.

The MCI/TWCIS proposed porting arrangement does not meet the definition of service provider portability for several reasons. As discussed above, the extent to which VoIP may be classified as a telecommunications service or information service is currently an open question before the FCC.<sup>24</sup> Unless and until the FCC does classify VoIP as a telecommunications service, such a classification is inappropriate for VoIP providers. As such, the RLECs are not required to provide LNP to a non-telecommunications service provider, and they should not be required to provide indirectly (through MCI as an intermediary) what they would not be required to provide directly. Although MCI may be a telecommunications service provider for some purposes, in this situation no telecommunications service is being provided to the end user. The end user in this situation is not a telecommunications service customer of MCI. Thus, the two basic qualifications for service provider portability are not met. The end user does not have telecommunications service after the port and the service provider is not currently classified as a telecommunications service provider.

MCI suggests that the FCC has concluded that VoIP providers are entitled to

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<sup>24</sup> See discussion at page 9, *supra*.

LNP.<sup>25</sup> However, the order cited by MCI does not deal with LNP at all and is not an order of general applicability.<sup>26</sup> The FCC's order granted SBC Internet Services, Inc. ("SBCIS") a waiver under specific circumstances to allow that company to obtain telephone numbers directly from the numbering administrator to expand SBCIS's VoIP trial.<sup>27</sup> No other providers can obtain numbers based on this order, let alone argue that the order entitles them to LNP so that they may port those numbers to another entity when the intermediary does not have a relationship with the end-user customer.

For the reasons stated above, we adopt the following language proposed by the RLECs, because it comports with the RLECs' obligations with respect to LNP, but does not require the RLECs to provide LNP in a manner that exceeds those obligations to the detriment of the RLECs, their customers, and the general public:

LNP Attachment, § 1.1:

The Parties will offer service provider local number portability (LNP) in accordance with the FCC rules and regulations. Service provider portability is the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another. Under this arrangement, the new Telecommunications Service provider must directly provide Telephone Exchange Service or resell an end user local exchange service through a third party Telecommunications Service provider to the End User Customer porting the telephone number. The dial tone must be derived from a switching facility that denotes the switch is ready to receive dialed digits. In order for a port request to be valid, the End User Customer must retain their original number and be served directly by the same type of Telecommunications Service subscribed to prior to the port.

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<sup>25</sup> See TR at 128.

<sup>26</sup> See Order, *In the Matter of Administration of the North American Numbering Plan*, CC Docket No. 99-200, rel. Feb. 1, 2005 ("SBCIS Order").

<sup>27</sup> *Id.*



**TOPIC 2: ISP-BOUND TRAFFIC AND VIRTUAL NXX (Issues 8, 10(b),  
and 13)**

We will discuss Issues 8, 10(b) and 13 together.

**ISSUE 8: Is ISP traffic in the SC or FCC's jurisdiction in terms of determining compensation when FX or virtual NXX service is subscribed to by the ISP?**

**MCI's Position:**

See Issue No. 10 (b). ISP traffic is in the FCC's jurisdiction and subject to reciprocal compensation treatment pursuant to its ISP Remand Order as amended by the CoreCom decision. The Texas PUC recently clarified that its order applying access charges to CLEC FX traffic only applied to non-ISP traffic and that the FCC's ISP Remand order applies to ISP traffic. While MCI believes that it is discriminatory to allow ILECs to rate their FX and virtual NXX traffic as local when CLECs are not allowed to do the same, it will not litigate this issue, as concerns the ITCs, for non-ISP traffic in light of the Commission's previous decisions. However, MCI reserves the right to have its FX and virtual NXX services rated as local if the FCC preempts the subset of states that have inconsistent rulings on the rating of CLEC FX or virtual NXX services.

**RLECs' Position:**

The issue in dispute between the RLECs and MCI is not, as MCI suggests, whether ISP-Bound traffic is in the jurisdiction of the South Carolina Commission or the FCC. The issue is what constitutes ISP-bound traffic, especially when the CLEC assigns a virtual NXX as a dial-up ISP number and the ISP is not physically located in the RLEC's local calling area. Under the RLECs' proposed language all types of

interexchange calls, including dial-up ISP calls using a virtual NXX, are to be treated consistent with the Commission's and the FCC's existing rules which exclude all such calls from reciprocal compensation and ISP intercarrier compensation.

**ISSUE 10(b): Should MCI have to provide service only to End Users physically located in the same LATA to be covered by this agreement?**

**MCI's Position:**

No. ISP traffic is under the FCC's jurisdiction, and it never said its ISP reciprocal compensation orders do not apply to FX traffic. FX/ISP provider customers do not have to be physically located in the LATA to be treated the same as voice traffic. The FCC has established a compensation regime for ISP traffic that does not require payment of access charges.

**RLECs' Position:**

For purposes of this agreement, yes. The physical location of the originating and terminating customer determines the jurisdiction of the call. This principle is consistent with the Commission's previous decisions in the US LEC and Adelphia Arbitration cases.

**ISSUE 13: Should all intraLATA traffic be exchanged on a bill and keep basis or should reciprocal compensation apply when out of balance?**

**MCI's Position:**

MCI believes reciprocal compensation rates should apply for ISP and non-ISP Local/EAS traffic if out of balance (60/40). MCI believes the recent CoreCom ruling allows it to seek reciprocal compensation for ISP traffic in new markets.

RLECs' Position:

Compensation for IntraLATA Traffic should be in the form of the mutual exchange of services provided by the other Party with no per minute of use billing related to the exchange of such IntraLATA Traffic. From the beginning of negotiations, the RLECs proposed that there be no per minute of use billing for the exchange of IntraLATA Traffic under the agreement because MCI is a CLEC and can change business plans at any time in order to serve a certain sub-set of end users customers, and it can use regulatory arbitrage to its financial advantage. RLECs do not have this flexibility to choose certain customers, because they are carriers of last resort and have an obligation to provide basic local exchange service to all end user customers within their respective certificated service areas.

Discussion:

The main issue in dispute between the RLECs and MCI with respect to this topic is not whether ISP-Bound traffic is in the jurisdiction of the South Carolina Commission or the FCC, as MCI suggests. The issue is whether the traffic destined for an ISP to which a Virtual NXX has been assigned (*i.e.*, the ISP is not physically located in the RLEC's local calling area but MCI has assigned a local number to the ISP) should be treated the same as local ISP traffic or non-local ISP traffic. The RLECs assert that all types of interexchange calls, including dial-up ISP calls using a Virtual NXX, should be treated in a manner consistent with the Commission's and the FCC's existing rules, which exclude all such calls from reciprocal compensation and ISP intercarrier compensation.

The Commission's and the FCC's current intercarrier compensation rules for wireline calls clearly exclude interexchange calls from both reciprocal compensation and ISP intercarrier compensation. These calls are subject to access charges. This is also the case for virtual NXX calls, which are no different from standard dialed long distance toll or 1-800 calls. All of these types of calls are interexchange calls that do not fall within the reciprocal compensation rules. In other words, if an RLEC customer calls someone in California, it is a long distance call, regardless of whether the RLEC customer is calling a friend or calling AOL in California. That traffic is considered interexchange and is not the type of ISP-bound traffic that has been the subject of recent FCC orders in ISP reciprocal compensation.

The question that has been addressed by the FCC is how to treat ISP-bound traffic in a situation where the ISP is physically located within the same local calling area that is served by a LEC.<sup>28</sup> The FCC found that such traffic is "information access" and, therefore, not within the scope of Section 251(b)(5); *i.e.*, it is not subject to the FCC's reciprocal compensation rules.<sup>29</sup>

It is clear from the FCC orders and rules that (1) traffic destined for customers (including ISPs) outside the local exchange area is interexchange traffic and is to be treated as such; and (2) traffic destined for ISPs inside the local exchange area is subject to compensation under the FCC's interim ISP-bound traffic compensation regime.<sup>30</sup>

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<sup>28</sup> Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("ISP Remand Order"), at ¶ 13.

<sup>29</sup> *ISP Remand Order* at ¶ 44.

<sup>30</sup> See *ISP Remand Order*, see also Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the "ISP Remand Order"*, WC Docket No. 03-171 (rel. Oct. 18,

Some carriers have a practice of assigning local numbers to customers when the customer is not physically located in the local area. This practice is known as assigning a "Virtual NXX." A Virtual NXX is an exchange code assigned to end users physically located in exchanges other than the one to which the code was assigned. The issue that has arisen in this arbitration is how such Virtual NXX traffic should be treated when it is destined for an ISP that is physically located outside the local exchange area but has been assigned a local number. The RLECs believe the answer is clear that Virtual NXX traffic should be treated the same regardless of whether it is destined for an ISP or some other type of business.

There is clear precedent in the Commission's prior orders with respect to the practice of assigning Virtual NXX's, both with respect to ISPs and to other customers. This Commission has also ruled in two separate orders that the physical location of the customer determines the proper jurisdiction of calls. In the *Adelphia Arbitration Order*,<sup>31</sup> the Commission concluded that reciprocal compensation should be based on the physical location of the calling and called parties, not the NXX codes of those parties. In the *US LEC Arbitration Order*,<sup>32</sup> the Commission held that:

This Commission has already addressed this issue in a prior arbitration and that decision supports Verizon's position in that this Commission held

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2004). While the D.C. Circuit Court of Appeals remanded the *ISP Remand Order* on the grounds that the FCC had failed to provide an adequate legal basis for the rules it had adopted, the Court did not vacate the order and observed that there may be other legal bases for adopting the rules. *See WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The FCC's interim rules remain in effect pending review on remand.

<sup>31</sup> *Petition of Adelphia Business Solutions of South Carolina, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252 (b) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996*, Docket No. 200-516-C, Order on Arbitration (January 16, 2001) ("*Adelphia Arbitration Order*").

<sup>32</sup> *Petition Of US LEC Of South Carolina, Inc. For Arbitration With Verizon South, Inc., Pursuant To 47 U.S.C. 252(b) Of The Communications Act Of 1934, As Amended By The Telecommunications Act Of 1996*, Docket No. 2002-181-C, Order No. 2002-619 (August 30, 2002) ("*US LEC Arbitration Order*").

that “reciprocal compensation is not due to calls placed to ‘virtual NXX’ numbers as the calls do not terminate within the same local calling area in which the call originated.” *The Commission squarely held that compensation for traffic depends on the end points of the call – that is, where it physically originates and terminates.* In rejecting the claim that “the local nature of a call is determined based upon the NXX of the originated and terminating number,” the Commission noted that, “[w]hile the NXX code of the terminating point is associated with the same local service area as the originating point, the actual or physical termination point of a typical call to a ‘virtual NXX’ number is not in the same local service area as the originating point of the call.” (emphasis added)<sup>33</sup>

MCI argues that the *Adelphia* and *US LEC* Orders “should no longer be controlling, at least with regard to ISP-bound traffic.”<sup>34</sup> We see no reason to deviate from our prior rulings. Virtual NXX for dial-up calls to ISPs is not “ISP-bound Traffic,” as MCI argues, but is interexchange traffic that is subject to the appropriate access charges. As we have found in prior orders, the physical location of the calling and called parties determines the proper treatment of the call.<sup>35</sup> In the above example, if the customer is calling AOL in California, it is a long distance call. The fact that a CLEC attempts to have those calls rated as local calls by assigning a local number to that customer (Virtual NXX) does not make them local calls, because the calls are still terminating in California.

Nothing in the FCC’s rules or orders indicates anything to the contrary. The ISP intercarrier compensation regime established in the FCC’s *ISP Remand Order*<sup>36</sup> does not apply to Virtual NXX or other interexchange calls delivered to ISPs, as MCI contends.

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<sup>33</sup> *Id.* at 22 (emphasis added).

<sup>34</sup> MCI Petition at p. 18.

<sup>35</sup> *Id.*

<sup>36</sup> Order on Remand and Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”).

The United States Court of Appeals for the District of Columbia Circuit, in reviewing the FCC's order, clearly recognized that the "interim [compensation] provisions devised by the [FCC]" apply only to "calls made to [ISPs] located within the caller's local calling area."<sup>37</sup> In other words, the ISP intercarrier compensation regime applies only to calls that would have been subject to reciprocal compensation if made to an end-user customer, rather than an ISP.

The D.C. Circuit Court's understanding of the scope of the intercarrier compensation obligation established in the *ISP Remand Order* is correct. The question before the FCC with respect to ISP-bound traffic has always been whether calls to an ISP physically located in the same local calling area as the calling party are to be treated the same as calls to a local business. Thus, in the *ISP Declaratory Ruling*,<sup>38</sup> the FCC rejected CLECs' arguments that a call to an ISP "terminate[s] at the ISP's local server" and "ends at the ISP's local premises." And, in the *ISP Remand Order*, the FCC recognized that it was addressing the compensation due for "the delivery of calls from one LEC's end-user customer to an ISP in the same local calling area that is served by a competing LEC."<sup>39</sup>

Issue 10(b) involves whether or not the jurisdiction of the call should be determined based on the physical locations of the originating and terminating customers. This is the long-established and settled rule for determining the proper treatment and rating of calls. Both the FCC and this Commission have determined that the call jurisdiction is based on the physical location of the end user customers. The FCC has

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<sup>37</sup> *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Circuit 2002).

<sup>38</sup> Declaratory Ruling and Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689 (1999) ("*ISP Declaratory Ruling*"), at ¶¶ 12-15.

<sup>39</sup> *ISP Remand Order* at ¶¶ 10, 13.

determined that the end-user customers involved in a telecommunications transmission must be physically located within the "local area" in order for the FCC to conclude that such traffic is "local."<sup>40</sup>

As discussed above, we have previously ruled in two separate orders that the physical location of the customer determines the proper jurisdiction of calls. In the *Adelphia Arbitration Order* and again in the *US LEC Arbitration Order*, we concluded that reciprocal compensation should be based on the physical location of the calling and called parties, not the NXX codes of those parties. Furthermore, in the *US LEC Arbitration Order*, we specifically recognized and discussed the application of this rule to Virtual NXX traffic destined for ISPs outside the local calling area.<sup>41</sup> We see no reason to modify or deviate from our prior precedent.

Issue 13 relates to whether there should be reciprocal compensation paid for out-of-balance traffic. The RLECs have proposed that there should not be a per-minute compensation rate for the exchange of IntraLATA Traffic, but that compensation for IntraLATA Traffic should be in the form of the mutual exchange of services provided by the other Party. This is because the traffic should be roughly balanced if the parties are treating the traffic in an appropriate manner, as described above. However, it is obvious from MCI's position with respect to ISP-bound Virtual NXX traffic that it intends to provide dial-up service to ISPs and believes that such dial-up traffic using Virtual NXX should be subject to reciprocal compensation. As stated above, such Virtual NXX traffic is not "ISP-bound Traffic" under the FCC's *ISP Remand Order* and therefore is not

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<sup>40</sup> See Order *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (1996) at ¶ 1043.

<sup>41</sup> See *US LEC Arbitration Order* at pp. 25-27.



subject to reciprocal compensation. The only traffic that would be subject to reciprocal compensation is the remaining IntraLATA Traffic which, in the absence of regulatory arbitrage, should be roughly balanced.

Moreover, MCI is a CLEC and can change its business plan at any time to serve a certain sub-set of end users to enhance its payments from interconnecting carriers. MCI can target a type of customer like an ISP, thereby potentially generating out-of-balance traffic. RLECs do not have the flexibility to choose certain types of customers, as the RLECs must serve any end user customer within their respective service areas who requests service.

For the reasons stated above, we adopt the RLECs' proposed language relating to ISP-Bound Traffic and Virtual NXX issues, as follows:

GT&C, Glossary §§ 2.25, 2.28, 2.34:

**INTRALATA TRAFFIC** Telecommunications traffic that originates and terminates in the same LATA, including but not limited to IntraLATA toll, ISP bound and Local/EAS.

**ISP-BOUND TRAFFIC**

ISP-Bound Traffic means traffic that originates from or is directed, either directly or indirectly, to or through an information service provider or Internet service provider (ISP) who is physically located in an exchange within the Local/EAS area of the originating End User Customer. Traffic originated from, directed to or through an ISP physically located outside the originating End User Customer's Local/EAS area will be considered switched toll traffic and subject to access charges.

**LOCAL/EAS TRAFFIC**

Any call that originates from an End User Customer physically located in one exchange and terminates to an End User Customer physically located in either the same exchange or other mandatory local calling area associated with the originating End User Customer's exchange as defined and specified in ILEC's tariff.